Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-574

GIBSON DISTRIBUTING COMPANY, INC., ET AL.,
Appellant,

vs.

DOWNTOWN DEVELOPMENT ASSOCIATION
OF EL PASO, INC.,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF TEXAS

JURISDICTIONAL STATEMENT

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DATE: October 4, 1978

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INDEX

OPINION BELOW 1
JURISDICTION 2
QUESTIONS PRESENTED 2
STATUTES INVOLVED 3
STATEMENT 3
THE QUESTIONS ARE SUBSTANTIAL 7
CERTIFICATE OF SERVICE 13
APPENDIX A—
Opinion, Supreme Court of Texas 15
Judgment, 120th Judicial Court of Texas 19
APPENDIX B—
Article 9001, Texas Revised Civil Statutes 23
Section 1, Sherman Act 25

Table of Citations

CASES

Braunfeld v. *Brown*, 366 U.S. 599 (1961) 4
Cantor v. *Detroit Edison Company*, 428 U.S. 579 (1976) 7, 8, 9
Gallagher v. *Crown Kosher Super Market*, 366 U.S. 617 (1961) 4
Gibson Distributing Co., Inc., et al. v. *Downtown Development Association of El Paso*, 21 Tex. Sup. Ct. 493 (July 12, 1978) 1, 8, 9, 10
McGowan v. *Maryland*, 366 U.S. 420 (1961) 4, 11
Parker v. *Brown*, 317 U.S. 341 (1943) 8, 10

State v. *Spartan's Industries, Inc.*, 447 S.W.2d 407 (Tex. Sup. 1969), appeal dismissed, 397 U.S. 590 (1970) 5, 10, 11

Two Guys from Harrison-Allentown, Inc. v. *McGinley*, 366 U.S. 582 (1961) 4

Vornado, Inc. v. *Hyland*, 148 N.J. Super. 343, 372 A.2d 667 (Super. Ct. Law Div. 1977) 12

STATUTES

15 U.S.C. §1 (Sherman Act) 2, 3, 6, 7, 8, 9

28 U.S.C. §1257(2) 2

Tex. Rev. Civ. Stat. Ann., Art. 9001 ..... 1-10, 12

Tex. Penal Code, Art. 286a 3-4, 5

TEXT & TREATISES

Harper, *The Texas Blue Laws* (1974) 4, 5, 6, 12

Comment, *The State Action Antitrust Exemption: The Confinement of the Parker Doctrine Within the Emerging Cantor Formula*, 29 Hastings L. J. 211, 231 n. 73 (1977) 8, 9

Comment, *The State Action Antitrust Exemption: from Parker* v. *Brown to Cantor* v. *Detroit Edison Co.*, 1977 Duke L. J. 871, 877-85 (1977) 10

In the Supreme Court of the United States

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GIBSON DISTRIBUTING COMPANY, INC., ET AL.,
Appellant,

vs.

DOWNTOWN DEVELOPMENT ASSOCIATION OF EL PASO, INC.,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF TEXAS

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of Texas, entered on July 12, 1978, upholding the validity of the Texas Blue Law, Article 9001 of the Texas Revised Civil Statutes, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Supreme Court of Texas is reported at 21 Tex. Sup. Ct. 493 (July 12, 1978). The order of the 120th Judicial District Court is not and will not be reported. Copies of the opinion of the Supreme Court of Texas and of the judgment of the 120th Judicial District Court of Texas are attached hereto as Appendix A.

JURISDICTION

After Appellee brought suit in the 120th Judicial District Court of Texas to enforce Article 9001 of the Texas Revised Civil Statutes, often called the Texas Blue Law, Appellant contested the validity of Article 9001 on the grounds that Section 4 of the statute was preempted by Section 1 of the Sherman Act and that it violated the due process clause of the United States Constitution. The District Court ruled in favor of the statute's validity on January 23, 1978. Under the Texas statutes and rules of civil procedure, a direct appeal was taken to the Supreme Court of Texas, which also ruled in favor of the statute's validity by opinion dated July 12, 1978. The jurisdiction of the Supreme Court to review this opinion by appeal is conferred by 28 U.S.C. §1257(2).

QUESTIONS PRESENTED

1. When Section 4 of Article 9001 allows private parties to join in concert to prohibit their competitors from selling certain items one day a week, normally Sunday, and thus allows the private parties to protect their competitive share of the market without opening on that one day, is the section preempted by Section 1 of the Sherman Act, which encourages competition, as an unnecessary burden on the regulation of interstate commerce by the U. S. Congress?

2. When the legislative history of Article 9001 and the extensive record in the trial court show conclusively that the article clearly fails to accomplish its stated purposes of promoting the health, recreation and welfare of the people of Texas and its interpreted purpose of granting a common day of rest to the people of Texas, does the article violate the due process clause of the United States Constitution?

STATUTES INVOLVED

Article 9001 of the Texas Revised Civil Statutes and Section 1 of the Sherman Act are set forth in Appendix B.

STATEMENT

Appellant owns and operates several retail stores in cities in the western part of Texas, including El Paso, Texas. Appellant's stores are of the type often referred to as discount stores. Appellee is an incorporated association, many of whose members are downtown merchants in El Paso, Texas.

Since about 1970, Appellee has shown an interest in enforcing Article 9001 of the Texas Revised Civil Statutes, which prohibits the sale of 42 enumerated items on consecutive Saturdays and Sundays. Enforcement has been accomplished pursuant to Section 4 of the statute which states that "any person may apply to any court of competent jurisdiction for and may obtain an injunction restraining" vic.ations of the statute. While pursuing the enforcement of Article 9001, Appellee determined that Appellant had violated the statute by selling prohibited articles on consecutive Saturdays and Sundays. Suit was filed and a temporary injunction was issued against Appellant. Before the trial on the permanent injunction, Appellant filed amended pleadings on October 14, 1977, and raised the due process and exemption arguments now before this Court in this jurisdictional statement. A nonjury trial ensued.

During the trial, Appellant cited a scholarly book to the Court by William Harper published in 1974 and entitled *The Texas Blue Laws*. In his book Harper observed that considerable debate surrounded the passage of Article

286a, the exact predecessor to Article 9001 in all important respects. In Chapter VI of his book, Harper examined the debate that occurred during a special session of the Fifty-seventh Legislature after the United States Supreme Court declared constitutional Sunday closing laws in several states. *McGowan* v. *Maryland*, 366 U.S. 420 (1961); *Gallagher* v. *Crown Kosher Super Market*, 366 U.S. 617 (1961); *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 366 U.S. 582 (1961); *Braunfeld* v. *Brown*, 366 U.S. 599 (1961).

The Supreme Court decisions did not, however, serve as the impetus for the enactment of Article 286a. The impetus came from downtown merchants in Texas, represented by the Texas Retail Federation, who were faced with new competition because of the rapid growth of discount stores. These stores operated in outlying shopping centers and did much of their business on Sunday. Harper, *The Texas Blue Laws* 96 (1974). In 1961, the Federation asked a member of the Texas Senate, William T. Moore, to introduce the bill that was to become Article 286a. In introducing the bill, he said that "this is an economic measure, not a moral issue." *Id.* at 98. Moore emphasized that "we're trying to maintain the *status quo* that prevailed before these discount houses came down here from the East and disrupted our way of business." *Id.*

Another Texas Senator concurred that it was "not fair for a bunch of Northerners to come down here and disrupt our old, established methods of operation." *Id.* Senator Moore's bill was also recognized as an economic measure by a Texas Representative who observed that "all this bill is aimed at is regulating competition. This entire matter is an out-growth of the fight between downtown department stores and suburban discount stores." *Id.* at 100.

Senator Moore successfully pushed his bill through the Legislature and Article 286a became effective on November 8, 1961. The goal—to regulate competition between department and discount stores—was accomplished since the prohibited items of merchandise had been "carefully selected as those constituting the bulk of Sunday business of discount houses." *Id.* at 101. Article 286a and now Article 9001 is thus a "six-day business-week law imposed on the merchandising of forty-two specifically enumerated types of articles." *Id.* at 102. Interestingly enough, however, this goal of economic regulation has never been officially recognized as a goal of Article 9001. Instead, the Legislature wrote that the statute's goals were to promote the health, recreation and welfare of the people of Texas. The Supreme Court of Texas has observed that this goal is accomplished since the statute provides a single day of rest for the people of Texas. *State* v. *Spartan's Industries, Inc.*, 447 S.W.2d 407, 412 (Tex. Sup. 1969), appeal dismissed, 397 U.S. 590 (1970).

After giving the court the advantage of an historical picture of Article 9001, Appellant presented evidence bearing on the statute's infirmities. Appellant called its group manager, Mr. James Gunn, who testified that his company has noticed a trend toward increased customer preference for Sunday shopping (SF 75-79). Then Appellant called three experts, two of whom, an economist and a sociologist, concluded that (1) Article 9001 impeded rather than promoted the health, recreation and welfare of the people of Texas and (2) Article 9001 failed to insure a single day of rest for the people of Texas. After its witnesses testified, Appellant placed into evidence answers by Appellee to Appellant's interrogatories (SF 172-87). The answers dealt with questions surrounding the competition between the parties.

Appellee's rebuttal witness was Mr. Herbert Schwartz, a member of the association. He stated that the purpose

of Article 9001 was to "combat" a "threat to a six day week" (SF 203). In El Paso County, that threat has been presented in the form of competitors like Appellant (SF 203). If these competitors were allowed to open in a normal way seven days a week, then the members of the association like The Popular, a store with which Mr. Schwartz is associated, would be required to open "very quickly" on Sunday to protect their "share of the market" (SF 203). The only way association members can protect their share of the market and continue with a six day week, according to Mr. Schwartz, is to enforce Article 9001 (SF 204). Thus, the association is active in its enforcement efforts.

In essence, the testimony of Mr. Schwartz confirmed the history of Article 9001 as recorded in the book *The Texas Blue Laws*. His testimony did more, however. It also served to confirm the testimony of Appellant's economist and sociologist. For example, he admitted that only 15 to 20 percent of the total work force of Texas was involved in retailing (SF 207-211). The statute does not affect all of that percentage since only portions of retailing deal in items which would be prohibited from sale on consecutive Saturdays and Sundays (SF 210-11). Consequently, even if the statute were repealed, less than 14 or 15 percent of the work force would be affected (SF 211). Mr. Schwartz also admitted that, although he did not find shopping recreational, he thought some people did (SF 215). It could be "fun", an "amusement", "entertaining" (SF 215). He thought that it was "a fair statement" that "some people find it recreational sometimes" (SF 215).

Despite this record, the trial court found that Article 9001 met due process standards and did not conflict with the Sherman Act. The Supreme Court of Texas agreed. An analysis of its opinion, which follows in the next section

of this jurisdictional statement, clearly shows why the questions presented by this appeal are so substantial as to require plenary consideration.

THE QUESTIONS ARE SUBSTANTIAL

Appellant contends that the State of Texas, in passing Article 9001, has so ignored the competitive requirements of the Sherman Act and the due process constraints of the Constitution that this appeal must be considered. Article 9001 was enacted to appease the downtown merchants of Texas who demanded and received competitive advantage over their suburban discount brothers. The granting of the advantage clearly provided no general benefit to the Texas populace. The statute consequently could not be justified as a legitimate state regulation of competition. Realizing this, the Legislature tried to camouflage the nature of Article 9001 by announcing that it promoted the health, recreation and welfare of the people. The facts developed at trial overwhelmingly belie the legislative announcement. The magnitude of the problem is exemplified by the opinion the Texas Supreme Court had to write in an attempt to uphold the statute.

1. In recent years, the Supreme Court has addressed related concepts which are integral parts of the federal antitrust laws: exemption and preemption. Both often have been either misunderstood or confused; both are still being refined as new factual situations present new questions. This appeal raises important questions about these two concepts which are so substantial as to require plenary consideration.

The questions relate to the Supreme Court's decision in *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579 (1976), where the exemption concept was in issue and where the pre-

emption concept was discussed. The concept of exemption, which allows a party to escape federal antitrust liability because its conduct constitutes state action, was narrowed to apply only to state agencies, not private parties. The concept of preemption, which invalidates state statutes and regulations in conflict with federal antitrust laws because the laws preempt the field, was clarified. Further, in *Cantor*, according to one commentator, the concepts were separated and differentiated in Section III of the decision. Comment, *The State Action Antitrust Exemption: The Confinement of the Parker Doctrine Within the Emerging Cantor Formula*, 29 Hastings L. J. 211, 231, n. 73 (1977). The same commentator observed that another writer on the subject named Dorman intermingled the concepts. *Id.* Although *Cantor* does not sanction intermingling, the writer Dorman has not been the only party guilty of the offenses; in this case the Supreme Court of Texas was also guilty.

Appellant argued in its pleadings at trial and in its appeal to the Texas Supreme Court that Section 4 of Article 9001 of the Texas Revised Civil Statutes was preempted by Section 1 of the Sherman Act because it allowed private parties like Appellee association to join in concert and restrict sales by competitors at least one day a week. Appellant had not challenged all of Article 9001; it challenged only Section 4. In its opinion the Texas Supreme Court did not acknowledge the limited challenge even though it did state that the issue of preemption was the one raised by Appellant. 21 Tex. Sup. Ct. 493 (July 12, 1978). After so stating, however, the Court then cited *Parker* v. *Brown*, 317 U.S. 341 (1943), the case first delineating the exemption concept, and concluded after reviewing more recent cases that preemption was simply not applicable because the action of the State of Texas in legislating Article 9001 left activities performed under the

statute exempted from the reach of the Sherman Act. 21 Tex. Sup. Ct. 493 (July 12, 1978).

It would be difficult to imagine a clearer example of a court intermingling the concepts of preemption and exemption, concepts which should be separated in any analysis. Moreover, it was especially inappropriate for the Texas Supreme Court to reject Appellant's preemption argument in this case by citing and relying upon exemption decisions, when a question of antitrust liability was not being raised. Each concept must be addressed by a separate analysis. Finally, the Supreme Court ignored another teaching of *Cantor*: exemption does not apply to private parties, like Appellee here.

If the Texas opinion stands, the confusion surrounding the two concepts will be intensified and the Supreme Court's effort in Section III of *Cantor* to clarify the concepts will be negated. To prevent such results, this Court is respectfully requested to find that the questions raised here are so substantial as to require plenary consideration. If the appeal is then given such consideration, this Court will be able to see that the confusing analysis by the Texas Supreme Court not only negated the clarifying effort in *Cantor*, but also resulted in an incorrect holding.

Under the suggested *Cantor* analysis, Section 4 of Article 9001 and the interest of Texas in regulating weekend sales of merchants would be balanced against the federal antitrust interest in preserving open competition. Comment, *The State Action Antitrust Exemption: The Confinement of the Parker Doctrine Within the Emerging Cantor Formula, supra* at 238. Appellant asserts that the balance favors the federal antitrust interest. A full presentation to this Court will substantiate the assertion and require that Section 4 be held preempted by Section 1

of the Sherman Act. Therefore, retail merchant associations in Texas will no longer be able to tell their competitors that they can compete only six days, not seven.

2. The Texas Supreme Court's inappropriate utilization of the exemption concept in this case also destroys the efficacy of its reasoning in rejecting Appellant's due process arguments. Most commentators and courts seem to agree that exemption occurs and the *Parker* doctrine is applicable only when it appears that the legislature has expressed some intent to implement a state policy through anticompetitive measures. See, *e.g.*, Comment, *The State Action Exemption in Antitrust: from Parker v. Brown to Cantor v. Detroit Edison Co.*, 1977 Duke L. J. 871, 877-85 (1977); Comment, *The State Action Antitrust Exemption: The Confinement of the Parker Doctrine Within the Emerging Cantor Formula, supra* at 238. No such intent has ever been expressed by the Texas Legislature in connection with Article 9001. Indeed, the legislative intent expressed in the statute is to promote the health, recreation and welfare of the people. The legislative intent divined by the Texas courts is that Article 9001 is to provide "a single day of rest for all the family, and for the bulk of the community." *State* v. *Spartan's Industries, Inc.*, 447 S.W.2d 407, 412 (Tex. Sup. 1969), appeal dismissed, 397 U.S. 590 (1970). In this case, the Texas Supreme Court again agreed that the statute was reasonably related to the public health and welfare. 21 Tex. Sup. Ct. 493 (July 12, 1978).

By using the exemption concept, the Court creates a true dilemma. If Article 9001 was intended to be an anticompetitive measure, it has no reasonable relationship to any of its purposes, stated or interpreted. It thus violates the precept of due process. On the other hand, if it was intended to accomplish its stated and interpreted purposes, it was not intended to have anticompetitive effect. Exemption does not apply and the Texas Supreme Court therefore cannot rely on the concept. Either way, the decision is wrong.

This dilemma illustrates why the question presented under the due process argument of this appeal is so substantial as to require plenary consideration. Unless courts employ the concept of exemption correctly, vast confusion resulting in faulty analysis and improper results occurs. This appeal is a perfect vehicle which can be used by the Supreme Court first to illustrate the pitfalls inherent in the analysis of the exemption concept and then to clarify once and for all the proper utilization of the concept.

Before concluding, one other word must be written on the due process argument in this appeal. Appellant is well aware that the Supreme Court has written extensively on the due process problems of the state blue laws. It should be observed, however, that those decisions were rendered over 15 years ago apparently without a full record of trial proceedings before the Court. For example, Mr. Justice Frankfurter observed in one of the decisions that though the range of exceptions in the blue laws seemed somewhat incongruous in relation to the permissible purpose of protecting the public welfare, absence in the record of emphasis on the incongruity prevented the Court from examining it and therefore resulted in a determination that the blue laws were not at least per se unconstitutional. *McGowan* v. *Maryland*, 366 U.S. 420, 463 (1961) (Frankfurter, J., concurring). A full and complete record of incongruity will be before the Court in this case. Moreover, the one time the constitutionality of the Texas Blue Law was before the Supreme Court on appeal, no record of evidence was present. *State* v. *Spartan's Industries, Inc.*, 447 S.W.2d 407, 409 (Tex. Sup. 1969), appeal dismissed, 397 U.S. 590 (1970).

Examples of evidence from the trial record statement of facts are testimony from an economist that Article 9001 cannot possibly create a single day of rest in Texas since it keeps only 3.6 percent of the Texas work force out of employment on Sunday; from a sociologist that Article 9001 does not promote but rather (based on a scientific survey) impedes recreation and welfare; and from a vice president of Appellee association that Article 9001 was passed in fact to promote the welfare of retailers so that those who chose would not have to work a seven day week. Similar testimony led a New Jersey court recently to conclude that a blue law like Article 9001 was in conflict with due process requirements and thus unconstitutional. *Vornado, Inc.* v. *Hyland*, 148 N.J. Super. 343, 372 A.2d 667 (Super. Ct. Law Div. 1977). Appellant believes this Court will reach the identical conclusion, especially since there is one additional aid to any analysis of Article 9001: a learned and scholarly review of the statute in Harper, *The Texas Blue Laws* (1974). The record and the legislative history presented by Harper show clearly that Article 9001 is not constitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of October, 1978, three copies of the Jurisdictional Statement were mailed, postage prepaid, to Frank Feuille, IV, 1100 El Paso National Bank Building, El Paso, Texas 79901, Counsel for Appellee. I further certify that all parties required to be served have been served.

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APPENDIX

APPENDIX A

OPINION

GIBSON DISTRIBUTING COMPANY, INC., ET AL. v. DOWNTOWN DEVELOPMENT ASSOCIATION OF EL PASO, INC.

No. B-7383

Direct Appeal from El Paso County.

Cause submitted May 10, 1978.

Judgment of the District Court is affirmed. (Opinion by Chief Justice Greenhill.)

For Appellants: Kemp, Smith, White, Duncan and Hammond, Royal Furgeson, El Paso, Texas.

For Appellees: Scott, Hulse, Marshall and Feuille, Frank Feuille, IV, El Paso, Texas.

This is another lawsuit attacking the constitutionality of the so-called Sunday Closing Law of Texas, Article 9001 of our civil statutes.[1] Two grounds for the attack are due process and equal protection. The third is a contention that the Texas statute is invalid because it deals with restraint of trade, a field which, it is argued, has been pre-

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1. Unless otherwise indicated, statutory references are to Vernon's Texas Statutes Annotated. Article 9001 of the civil statutes was formerly Article 286a of the Penal Code. The statutory change was the subject of a major point in *Gibson Products Co., Inc. v. State*, 545 S. W. 2d 128 (Tex. 1976). The standing of Respondents to bring this suit is not a point of error in this court.

empted by the Congress and its Sherman Antitrust Act. More specifically, the point is that "Article 9001 . . . was preempted by the Sherman Act. . . ."

The case reaches us as a direct appeal from a district court in El Paso. That court upheld the constitutionality of the statute. We affirm that judgment.

Due Process and Equal Protection

The constitutional assaults of lack of due process and equal protection were made in at least two of our previous decisions.

In *State v. Spartan's Industries, Inc.*, 447 S. W. 2d 407 (Tex. 1969), in the face of a strong dissenting opinion of three justices, this court held that the statute was a valid exercise of the police power by the Texas Legislature; that it was reasonably related to the public health and welfare; that it treated all merchants alike and was not discriminatory; and was constitutional. Due process and equal protection were written upon at length.

Some seven years later, similar assaults were made in *Gibson Products Company, Inc. v. State,* 545 S. W. 2d 128 (Tex. 1976). Again by a divided court, the decision was that the statute was constitutional. The statute has not been changed; and while there were differences of opinion among us, we now regard this matter as settled. We, therefore, follow the two cases set out above; and the points that the statute is unconstitutional as lacking in due process and equal protection are overruled.

Federal Preemption

The argument that the "Sunday Closing Statute" was intended to benefit certain merchants over other merchants and to restrain trade is not new either. The substance

of these arguments was made in the above cases and in support of Gibson's equal protection and due process attacks on Article 9001. But the particular argument that the State's right to regulate the Saturday and Sunday sales of merchants has been preempted by the federal antitrust Sherman Act is new in this Court.

Article VI, section 2, of the Constitution of the United States (the Supremacy Clause) provides that the constitution and laws of the United States made in pursuance thereof "shall be the supreme Law of the Land." We recognize, as we must, the force of that provision. It is our view, however, that the Congress, by enacting the Sherman Act, did not intend to prohibit a valid exercise of the police power of the States,—as this Court has held the statute in question to be.

As we read *Parker v. Brown,* 317 U.S. 341 (1943), and other opinions of the Supreme Court, state action affecting commerce is generally considered to be "exempted" from the Sherman Act. Perhaps it is more accurate to say that the rule of preemption is simply not applicable to such state action. The Supreme Court, in *Parker v. Brown,* stated that,

> ". . . nothing in the language of the Sherman Act or in its history [suggests] that its purpose was to restrain a state or its officers or agents from activities directed by its legislature."

Not every act of a state or local subdivision necessarily comes within the exception to the Sherman Act. Thus, where a city engages in the business of selling electricity, gas, and water, its alleged acts to restrain trade from a competing privately owned utility are not automatically exempt. *City of Lafayette, Louisiana v. Louisiana Power & Light Co.*, ... U.S. ....., 46 U.S. Law Week 4265 (March

29, 1978). The lines of demarcation under *Parker v. Brown* are discussed in that Louisiana case and in the recent lawyer-advertising case of *Bates and O'Steen v. State Bar of Arizona*, ... U.S. ....., 53 L. Ed. 2d 810 (1977). In *Bates and O'Steen*, it was decided that the regulation and restriction of lawyers' advertising by the Supreme Court of Arizona was not preempted by the Sherman Act. Rather, the court held, such state action fell within the exemption announced in *Parker v. Brown*.[2] *See also, Taylor Drug Stores, Inc. v. Associated Dry Goods Corporation*, 560 F. 2d 211 (6th Cir. 1977). In the light of these opinions, it is our conclusion that Article 9001 is not preempted by the Sherman Act.

The judgment of the district court, which upheld Article 9001 against these attacks, is affirmed.

Joe R. Greenhill
Chief Justice

Opinion delivered July 12, 1978.

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2. The *Bates and O'Steen* case held, however, that the blanket suppression of legal advertising violated the free speech clause of the First Amendment.

IN THE DISTRICT COURT OF EL PASO COUNTY, TEXAS
ONE HUNDRED TWENTIETH JUDICIAL DISTRICT

No. 73-5535 (Consolidated)

DOWNTOWN DEVELOPMENT ASSOCIATION OF EL PASO, INC.,
Plaintiff,

vs.

GIBSON DISTRIBUTING CO., INC.—PERMIAN BASIN, d/b/a GIBSON'S DISCOUNT CENTER,
Defendant,

and

DOWNTOWN DEVELOPMENT ASSOCIATION OF EL PASO, INC.,
Plaintiff,

vs.

GIBSON DISTRIBUTING CO., INC.—PERMIAN BASIN, d/b/a GIBSON'S DISCOUNT CENTER; and SKAGGS-ALBERTSON'S PROPERTIES, INC., SKAGGS-ALBERTSON'S STORE; and FURR'S, INC., d/b/a FURR'S SUPERMARKETS,
Defendants.

JUDGMENT

On the 25th day of October, 1977, and the 27th day of December, 1977, in a bifurcated trial, the Court heard Plaintiff's amended motion for contempt and request for permanent injunction and then Defendant's special exceptions, pleas in abatement, pleas in bar and request for declaratory judgment. Plaintiff, the Downtown Development Association of El Paso, Inc., by and through its duly authorized representative and attorney, and Defendant,

Gibson Distributing Company, Inc.,—Permian Basin, d/b/a Gibson's Discount Center, by and through its duly authorized representative and attorney, announced ready for trial and agreed to the bifurcation of the trial. The Court then proceeded to receive the evidence and testimony. After both parties rested and closed and after the Court considered the arguments of counsel and the briefs filed by both parties, the Court decided that the motion for contempt and request for permanent injunction should be granted and that the special exceptions, pleas in abatement, pleas in bar and request for declaratory judgment should be denied.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Defendant, Gibson Distributing Company, Inc.—Permian Basin, d/b/a Gibson's Discount Center, is guilty of contempt of this Court for a willful violation of the Temporary Injunction duly issued by this Court on December 9, 1971, and Defendant is hereby fined the total sum of One Thousand Three Hundred and No/100 ($1,300.00) Dollars.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Clerk of this Court shall issue with a Permanent Injunction, restraining and enjoining the Defendant, Gibson Distributing Company, Inc.—Permian Basin, d/b/a Gibson's Discount Center, its officers, agents, servants and employees, and all persons in active concert and participation with said Defendant, from selling and/or offering to sell and from compelling, forcing or obliging their, and each of their, employees to sell clothing, clothing accessories, wearing apparel, footwear, headwear, home, business, office or outdoor furniture, kitchenware, kitchen utensils, china, home appliances, stoves, refrigerators, air conditioners, electric fans, radios, television sets, washing machines, driers, cameras, hardware, tools, excluding non-

power driven hand tools, jewelry, precious or semi-precious stone, silverware, watches, clocks, luggage, motor vehicles, musical instruments, recordings, toys, excluding items customarily sold as novelties and souvenirs, mattresses, bed coverings, curtains, mirrors, lawnmowers or cloth piece goods, on both the two consecutive days of Saturday and Sunday, unless in fact such article of merchandise is for charitable purposes or is to be used for funeral or burial purposes, or to be sold, or is sold as a part of or in conjunction with the sale of real property.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the special exceptions, pleas in abatement and pleas in bar of the Defendant, Gibson Distributing Company, Inc.,—Permian Basin, d/b/a Gibson's Discount Center, which exceptions and pleas tested the constitutionality of Article 9001 of the Texas Revised Civil Statutes as violating the principles of due process and equal protection guaranteed by the United States Constitution and Texas Constitution and as violating the supremacy clause of the United States Constitution, are in all things overruled and denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the request for declaratory judgment of the Defendant, Gibson Distributing Company, Inc.,—Permian Basin, d/b/a Gibson's Discount Center, is in all things overruled and denied.

IT IS FURTHER ORDERED that the cost of th' proceeding be taxed against the Defendant, Gibson Distributing Company, Inc.—Permian Basin, d/b/a Gibson's Discount Center, for which let execution issue if not timely paid.

Defendant, Gibson Distributing Company, Inc.—Permian Basin, d/b/a Gibson's Discount Center, in open court

duly excepted and gave notice of direct appeal to the Supreme Court of Texas under the authority granted under Article 1738a of the Texas Revised Civil Statutes.

Signed, entered and rendered on this the 23rd day of January, 1978.

/s/ (Illegible)
Judge of the 120th Judicial District Court

Approved as to form:

/s/ Frank Feuille, IV
Frank Feuille, IV
Attorney for Plaintiff

/s/ Royal Furgeson
Royal Furgeson

/s/ Taffy D. Bagley
Taffy D. Bagley
Attorneys for Defendant

APPENDIX B

TEXAS REVISED CIVIL STATUTES

Art. 9001. Sale of goods on both the two consecutive days of Saturday and Sunday

Prohibition of sales; items; misdemeanor

Section 1. Any person, on both the two (2) consecutive days of Saturday and Sunday, who sells or offers for sale or shall compel, force or oblige his employees to sell any clothing; clothing accessories; wearing apparel; footwear; headwear; home, business, office or outdoor furniture; kitchenware; kitchen utensils; china; home appliances; stoves; refrigerators; air conditioners; electric fans; radios; television sets; washing machines; driers; cameras; hardware; tools, excluding non-power driven hand tools; jewelry; precious or semi-precious stones; silverware; watches; clocks; luggage; motor vehicles; musical instruments; recordings; toys, excluding items customarily sold as novelties and souvenirs; mattresses; bed coverings; household linens; floor coverings; lamps; draperies; blinds; curtains; mirrors; lawn mowers or cloth piece goods shall be guilty of a misdemeanor. Each separate sale shall constitute a separate offense.

Sales for charitable and funeral or burial purposes; real property sales

Sec. 2. Nothing herein shall apply to any sale or sales for charitable purposes or to items used for funeral or burial purposes or to items sold as a part of or in conjunction with the sale of real property.

First offense; subsequent convictions; penalties

Sec. 3. For the first offense under this Act, the punishment shall be by fine of not more than One Hundred Dollars ($100.00). If it is shown upon the trial of a case involving a violation of this Act that defendant has been once before convicted of the same offense, he shall on his second conviction and on all subsequent convictions be punished by imprisonment in jail not exceeding six (6) months or by a fine of not more than Five Hundred Dollars ($500.00), or both.

Purpose; public nuisances; injunction; application and proceedings

Sec. 4. The purpose of this Act being to promote the health, recreation and welfare of the people of this state, the operation of any business whether by any individual, partnership or corporation contrary to the provisions of this Act is declared to be a public nuisance and any person may apply to any court of competent jurisdiction for and may obtain an injunction restraining such violation of this Act. Such proceedings shall be guided by the rules of other injunction proceedings.

Emergency purchases; certification

Sec. 4a. Repealed by Acts 1967, 60th Leg., p. 79, ch. 39, § 1, eff. Aug. 28, 1967.

Occasional sales

Sec. 5. Occasional sales of any item named herein by a person not engaged in the business of selling such item shall be exempt from this Act.

Legislative intent

Sec. 5a. It is the intent of the Legislature that Articles 286 and 287 of the Penal Code of Texas[1] are not to be considered as repealed by this Act; provided, however, that the provisions of said Articles shall not apply to sales of items listed in Section 1 of this Act which are forbidden to be sold on the day or days named in this Act. Acts 1961, 57th Leg., 1st C.S., p. 38, ch. 15, eff. Nov. 7, 1961.

This article was transferred from Vernon's Ann.P.C. art. 286a by authority of § 5 of Acts 1973, 63rd Leg., p. 995, ch. 399 enacting the new Texas Penal Code.

Section 4a, repealed by Acts 1967, 60th Leg. p. 79, ch. 39, § 1, required certification for emergency purchases.

SHERMAN ACT

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708; Dec. 12, 1975; Pub.L. 94-145, § 2, 89 Stat. 801.

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1. Now repealed by Acts 1973, 63rd Leg., p. 991, ch. 399, § 3(a), enacting the new Texas Penal Code.

Supreme Court, U. S.
FILED
OCT 26 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-574

GIBSON DISTRIBUTING COMPANY, INC., ET AL.,
Appellant,

vs.

DOWNTOWN DEVELOPMENT ASSOCIATION
OF EL PASO, INC.,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF TEXAS

MOTION OF APPELLEE TO DISMISS APPEAL

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DATE: October 25, 1978

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INDEX

I. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY THE APPEAL 1

II. THE FEDERAL QUESTION SOUGHT TO BE REVIEWED HAS BEEN EXPRESSLY PASSED ON 3

III. THE JUDGMENT OF THE SUPREME COURT OF TEXAS RESTS ON AN ADEQUATE NON-FEDERAL BASIS 7

CERTIFICATE OF SERVICE 9

APPENDIX A—Opinion, Supreme Court of Texas 11

APPENDIX B—Article 9001, Texas Revised Civil Statutes 15

List of Authorities

CASES

Arlan's Department Store of Louisville, Inc. v. *Kentucky*, 371 U.S. 218, 9 L.Ed.2d 264, 83 Sup.Ct. 277 (1962) 2

Cantor v. *Detroit Edison Co.*, 428 U.S. 579, 49 L.Ed.2d 1141, 96 Sup.Ct. 3110 (1976) 4, 5

Eastern Railroad Presidents' Conference v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 5 L.Ed.2d 464, 81 Sup.Ct. 523, rehearing denied, 365 U.S. 875, 5 L.Ed. 2d 864, 81 Sup.Ct. 899 (1961) 3

Gallagher v. *Crown Kosher Supermarket of Massachusetts*, 366 U.S. 617, 6 L.Ed.2d 536, 81 Sup.Ct. 1122 (1961) 6

Gibson Distributing Co., Inc., et al. v. *Downtown Development Association of El Paso, Inc.*, 21 Tex.Sup. Ct.Jur. 493 (July 12, 1978) 3

Gibson Products Co., Inc. v. *State of Texas*, 545 S.W.2d 128 (1976) 8

Hill v. *Gibson Discount Center*, 437 S.W.2d 289 (Tex. Civ.App., Amarillo, 1968, writ ref'd n.r.e.) 7
McGowan v. *Maryland*, 366 U.S. 420, 6 L.Ed.2d 393, 81 Sup.Ct. 1101 (1961) 6
Oyler v. *Boles*, 368 U.S. 448, 82 Sup.Ct. 501, 7 L.Ed.2d 446 (1962) 5
Parker v. *Brown*, 317 U.S. 341, 8 L.Ed. 315, 63 Sup.Ct. 307 (1943) 3
Soon Hing v. *Crowley*, 113 U.S. 703, 28 L.Ed. 1145 (1885) 8
Spartan's Industries, Inc. v. *Texas*, 397 U.S. 590, 25 L.Ed.2d 596, 90 Sup.Ct. 1359 (1970) 2, 7
State of Texas v. *Spartan Industries, Inc.*, 447 S.W.2d 407 (1969) 7
Sundaco, Inc. v. *Texas*, 397 U.S. 591, 25 L.Ed.2d 597, 90 Sup.Ct. 1362 (1970) 2
Taylor Drug Stores, Inc. v. *Associated Dry Goods Corp.*, 560 F.2d 211 (6th Cir., 1977) 3
Two Guys From Harrison-Allentown v. *McGinley*, 366 U.S. 582, 6 L.Ed.2d 551, 81 Sup.Ct. 1135 (1961) 6

CONSTITUTIONAL PROVISIONS

U. S. Const. 1st Amend. 3
U. S. Const. 14th Amend. 2, 6

STATUTES AND RULES

15 U.S.C. § 1 (Sherman Act) 2, 3
Tex. Rev. Civ. Stat. Ann. (Art. 9001) 2, 4, 6
Tex. Penal Code Art. 286a 7

TEXTS AND TREATISES

Harper, *The Texas Blue Laws* 6

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-574

GIBSON DISTRIBUTING COMPANY, INC., ET AL.,
Appellant,

vs.

DOWNTOWN DEVELOPMENT ASSOCIATION OF EL PASO, INC.,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF TEXAS

MOTION OF APPELLEE TO DISMISS APPEAL

Appellee moves that the appeal herein taken be dismissed on the grounds that said appeal does not present a substantial Federal question; the Federal question sought to be reviewed has been expressly passed on; and the judgment of the Supreme Court of Texas rests on an adequate non-Federal basis

I. NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY THE APPEAL.

Appellant seeks to have the Texas Blue Law declared unconstitutional, despite numerous decisions by the Supreme Court of Texas upholding its constitutionality, and numerous decisions by this Court upholding the constitu-

tionality of similar Saturday-Sunday Closing Laws in other States. In Appellant's *Jurisdictional Statement*, it has presented two questions for review by this Court, to wit:

(1) When Section 4 of Article 9001 allows private parties to join in concert to prohibit their competitors from selling certain items one day a week, normally Sunday, and thus allows the private parties to protect their competitive share of the market without opening on that one day, is the section preempted by Section 1 of the Sherman Act, which encourages competition, as an unnecessary burden on the regulation of interstate commerce by the U. S. Congress?

(2) When the legislative history of Article 9001 and the extensive record in the trial court show conclusively that the article clearly fails to accomplish its stated purposes of promoting the health, recreation and welfare of the people of Texas and its interpreted purpose of granting a common day of rest to the people of Texas, does the article violate the due process clause of the United States Constitution?

Neither of the questions presented by Appellant are "substantial" and do not merit further consideration or review by this Court. On at least two previous occasions involving this precise Texas Statute, this Court has dismissed the appeal for want of a substantial Federal question, *Spartan's Industries, Inc.* v. *Texas*, 397 U.S. 590, 25 L.Ed.2d 596, 90 Sup.Ct. 1359 (1970); *Sundaco, Inc.* v. *Texas*, 397 U.S. 591, 25 L.Ed.2d 597, 90 Sup.Ct. 1362 (1970). In *Arlan's Department Store of Louisville, Inc.* v. *Kentucky*, 371 U.S. 218, 9 L.Ed.2d 264, 83 Sup.Ct. 277 (1962), this Court also dismissed an appeal challenging the constitutionality of the Kentucky Sunday Closing Law for want of a substantial Federal question.

II. THE FEDERAL QUESTION SOUGHT TO BE REVIEWED HAS BEEN EXPRESSLY PASSED ON.

Appellant contends that the enforcement of the Texas Blue Law, by Appellant's competitors, is violative of Section 1 of the Sherman Act. In *Eastern Railroad Presidents' Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 5 L.Ed.2d 464, 81 Sup.Ct. 523, rehearing denied, 365 U.S. 875, 5 L.Ed.2d 864, 81 Sup.Ct. 899 (1961), this Court held that no violation of the Sherman Act could be predicated on the attempt by private persons to influence the passage or enforcement of State laws regulating competition in the trucking industry.

The precise question raised by Appellant has been considered and rejected in the recent case of *Taylor Drug Stores, Inc.* v. *Associated Dry Goods Corp.*, 560 F.2d 211 (6th Cir., 1977). In that particular action, a drug store company brought an antitrust suit against its competitors claiming damages represented by loss of profits when its business was allegedly diminished for three years, while it was enjoined from Sunday operations, as the result of a lawsuit filed by its competitors. The Court held that the competitors of the drug store company had a constitutional right of access to the State Courts to enforce the State Sunday Closing Law against the drug company under the First Amendment to the Constitution of the United States.

The Supreme Court of Texas, in its Opinion delivered on July 12, 1978, set forth in full in Appendix A and reported in 21 Tex.Sup.Ct.Jur. 493, felt that *Parker* v. *Brown*, 317 U.S. 341, 8 L.Ed. 315, 63 Sup.Ct. 307 (1943) was dispositive. It was the unanimous decision of the Supreme Court of Texas, as announced by Chief Justice Joe R. Greenhill, at page 494 of the Opinion that:

"As we read *Parker* v. *Brown*, 317 U.S. 341 (1943), and other opinions of the Supreme Court, State action affecting commerce is generally considered to be 'exempted' from the Sherman Act. Perhaps it is more accurate to say that the rule of pre-emption is simply not applicable to such State action."

Appellant seizes upon language in the case of *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 49 L.Ed.2d 1141, 96 Sup.Ct. 3110 (1976) to establish a semantical distinction between the concepts of pre-emption and exemption. The basic holding of *Cantor* is merely that unlawful private conduct is not exempt from the antitrust laws because it is permitted or required by State law. The facts in that case are clearly distinguishable from the facts presently before this Court. In *Cantor*, the utility provided free light bulbs to its customers. The Appellant alleged that the "tie" of light bulb sales to the provision of electric service violated the antitrust laws, and the fact that the arrangement had the imprimatur of the State of Michigan by virtue of their approval of the utility's tariff, should not exempt the utility from antitrust liability.

The facts before this Court do not involve a private party's efforts to wrap its self-protective business practices in the State's cloak of exemption. On the contrary, this case involves the enforcement of a State enacted (versus State approved) statute promoting the health, recreation and welfare of the people within that State. Article 9001 of the Texas Revised Civil Statutes is set forth in full in Appendix B. Section 4 of that Statute provides:

"The purpose of this Act being to promote the health, recreation and welfare of the people of this State, the operation of any business whether by any individual partnership or corporation contrary to the provi-

sions of this Act is declared to be a public nuisance and any person may apply to any court of competent jurisdiction for and may obtain an injunction restraining such violation of this Act. Such proceeding shall be guided by the rules of other injunction proceedings."

While placing great reliance upon the *Cantor* case, Appellant ignores Mr. Justice Blackmun's observation in his concurring Opinion at page 611:

"If, for example, the justification for the scheme lies in the protection of health or safety, the strength of that justification is forcefully attested to by the existence of a State enactment. I would assess the justifications of such enactments in the same way as is done in equal protection review, and where such justifications are at all substantial. . . I would be reluctant to find the restraint unreasonable."

Not only are the justifications for the Statute substantial, but the overwhelming evidence in the record demonstrates that Appellee has enforced the Statute in a fair and non-discriminatory manner: Downtown Development Association of El Paso, Inc. is composed of both large and small merchants, located throughout the City of El Paso, Texas (S.F. 173, 195); Appellee utilizes the funds of both members and non-members (S.F. 183) to shop merchants throughout the City (S.F. 42-43), both member and non-member, in a random manner (S.F. 178, 196); very few of the 24 lawsuits instituted by Appellee have been against suburban discount stores (S.F. 181-182) and injunctions, either temporary or permanent, have been obtained in each and every instance (S.F. 182, 198).

In *Oyler* v. *Boles*, 368 U.S. 448, 82 Sup.Ct. 501, 7 L.Ed.2d 446 (1962), this Court rejected a contention that selective enforcement of a penal statute against certain

habitual offenders was a denial of the equal protection guarantee under the Constitution and held that the conscious exercise of some selectivity in enforcement is not in itself a Federal constitutional violation.

In its second question, Appellant contends that the Texas Blue Law violates the Due Process Clause of the United States Constitution. Appellant places great reliance upon, and devotes a considerable portion of its *Jurisdictional Statement* to the alleged legislative history of Article 9001, as recounted in a book entitled *The Texas Blue Laws* by William Harper, published in 1974. As noted by the Texas Retailers' Association in its Amicus Curiae Brief to the Supreme Court of Texas, at page 3:

> "Appellant in his case relies heavily upon Harper's book, *The Texas Blue Laws*. We would show the Court that such book is not a competent authority on the legislative history of Article 9001. The Texas Legislature, at the time of the enactment of such Article, made no transcripts or recordings of any nature of House or Senate proceedings. This includes both testimony and discussions at Committee hearings and also floor debate and consideration. Such recordings and transcripts have only been made during the last few years. It is evident from such book that the alleged facts were obtained from *some* newspaper articles written at that time."

The question of whether similar State Sunday Closing Laws violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment have been considered and expressly rejected by this Court in *McGowan* v. *Maryland*, 366 U.S. 420, 6 L.Ed.2d 393, 81 Sup.Ct. 1101 (1961); *Two Guys From Harrison-Allentown* v. *McGinley*, 366 U.S. 582, 6 L.Ed.2d 551, 81 Sup.Ct. 1135 (1961); *Gallagher* v. *Crown Kosher Supermarket of Massachusetts*, 366 U.S. 617, 6 L.Ed. 2d 536, 81 Sup.Ct. 1122 (1961).

III. THE JUDGMENT OF THE SUPREME COURT OF TEXAS RESTS ON AN ADEQUATE NON-FEDERAL BASIS.

As stated previously, the Texas Legislature expressed the purpose of the Act "being to promote the health, recreation and welfare of the people" (Appendix B, Section 4). In *Hill* v. *Gibson Discount Center*, 437 S.W.2d 289 (Tex.Civ.App., Amarillo, 1968, writ ref'd n.r.e.), the Court stated:

> "We believe forbidding seven day work weeks promotes the health, recreation and welfare of the people of the State and comes within the police power of the State." (Page 293)

The Supreme Court of Texas reached a similar conclusion in *State of Texas* v. *Spartan Industries, Inc.*, 447 S.W.2d 407 (1969), whose appeal to this Court was dismissed for want of a substantial Federal question, *Spartan's Industries, Inc.* v. *Texas*, 397 U.S. 590, 25 L.Ed.2d 596, 90 Sup.Ct. 1359 (1970). At page 414 of the Supreme court of Texas' Opinion, they concluded:

> "Thus we are brought back to the question of the police power of the State, which turns upon the question of whether there is a reasonable relation between Article 286a (predecessor to Article 9001) and the health, recreation and welfare of the people of this State. It is not the function of the Courts to judge the wisdom of a legislative enactment. It is only when a Statute arbitrarily interferes with legitimate activities in such a manner as to have no reasonable relation to the general welfare, that this Court may rule the Statute to be unconstitutional on the grounds with which we are here concerned. With the long precedent for the constitutionality of the Sunday Clos-

ing Laws in this State, and with the view we take of this Statute as set forth above, we hold it to be validly related to the health, recreation and welfare of the people."

In *Gibson Products Co., Inc.* v. *State of Texas,* 545 S.W.2d 128 (1976), the Supreme Court of Texas once again found a reasonable relation between the Statute and its legislative purpose of promoting the health, recreation and welfare of the people of the State of Texas. On pages 129-130 of Justice Reevley's Opinion, he noted:

> "In State v. Spartan Industries, Inc., *supra,* we said that we understood the principal plan of the Statute to be the provision of effective sanctions to close most mercantile establishments on Sunday—Saturday being the better day for sales than Sunday. Allowing latitude for Sabbatarians and for some who prefer to tend only the Sunday trade, the Legislature thereby maintains the prevailing custom of people doing their serious shopping for clothing, furniture, automobiles, household and office appliances, and hardware on weekends. When the Legislature retained the Statute in 1973, it apparently decided to continue to serve that purpose. We regard the matter as a Legislative question and reaffirm the constitutionality of the present Statute."

In *Soon Hing* v. *Crowley,* 113 U.S. 703, 28 L.Ed. 1145 (1885), the Judges of the Circuit Court were divided on whether or not a California Statute regulating public laundries constituted a restraint of trade. On page 710 of the Court's Opinion, Mr. Justice Field answered the certified question in the negative and noted:

> "Laws setting aside Sunday as a day of rest are upheld, not from any right of the government to legislate

> for the promotion of religious observances, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labor. Such laws have always been deemed beneficent and merciful laws, especially to the poor and dependent, to the laborers in our factories and workshops and in the heated rooms of our cities; and their validity has been sustained by the highest courts of the States."

For the reasons set forth above, Appellee's Motion to Dismiss the appeal should be in all things sustained.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this, the 25th day of October, 1978, three copies of the Motion of Appellee to Dismiss Appeal were mailed, postage prepaid, to Royal Furgeson, P. O. Drawer 2800, El Paso, Texas 79999, Counsel for Appellant, and an additional three copies were mailed, postage prepaid, to David Kendal, First Assistant Attorney General of Texas, P. O. Box 12548, Capitol Station, Austin, Texas 78711. I further certify that all parties required to be served have been served.

FRANK FEUILLE, IV

APPENDIX

APPENDIX A

OPINION

GIBSON DISTRIBUTING COMPANY, INC., ET AL. v. DOWNTOWN DEVELOPMENT ASSOCIATION OF EL PASO, INC.

No. B-7383

Direct Appeal from El Paso County.

Cause submitted May 10, 1978.

Judgment of the District Court is affirmed. (Opinion by Chief Justice Greenhill.)

For Appellants: Kemp, Smith, White, Duncan and Hammond, Royal Furgeson, El Paso, Texas.

For Appellees: Scott, Hulse, Marshall and Feuille, Frank Feuille, IV, El Paso, Texas.

This is another lawsuit attacking the constitutionality of the so-called Sunday Closing Law of Texas, Article 9001 of our civil statutes.[1] Two grounds for the attack are due process and equal protection. The third is a contention that the Texas statute is invalid because it deals with restraint of trade, a field which, it is argued, has been preempted by the Congress and its Sherman Antitrust Act.

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1. Unless otherwise indicated, statutory references are to Vernon's Texas Statutes Annotated. Article 9001 of the civil statutes was formerly Article 286a of the Penal Code. The statutory change was the subject of a major point in *Gibson Products Co., Inc. v. State*, 545 S. W. 2d 128 (Tex. 1976). The standing of Respondents to bring this suit is not a point of error in this court.

More specifically, the point is that "Article 9001 . . . was preempted by the Sherman Act. . . ."

The case reaches us as a direct appeal from a district court in El Paso. That court upheld the constitutionality of the statute. We affirm that judgment.

Due Process and Equal Protection

The constitutional assaults of lack of due process and equal protection were made in at least two of our previous decisions.

In *State v. Spartan's Industries, Inc.*, 447 S. W. 2d 407 (Tex. 1969), in the face of a strong dissenting opinion of three justices, this court held that the statute was a valid exercise of the police power by the Texas Legislature; that it was reasonably related to the public health and welfare; that it treated all merchants alike and was not discriminatory; and was constitutional. Due process and equal protection were written upon at length.

Some seven years later, similar assaults were made in *Gibson Products Company, Inc. v. State,* 545 S. W. 2d 128 (Tex. 1976). Again by a divided court, the decision was that the statute was constitutional. The statute has not been changed; and while there were differences of opinion among us, we now regard this matter as settled. We, therefore, follow the two cases set out above; and the points that the statute is unconstitutional as lacking in due process and equal protection are overruled.

Federal Preemption

The argument that the "Sunday Closing Statute" was intended to benefit certain merchants over other merchants and to restrain trade is not new either. The substance of these arguments was made in the above cases and in

support of Gibson's equal protection and due process attacks on Article 9001. But the particular argument that the State's right to regulate the Saturday and Sunday sales of merchants has been preempted by the federal antitrust Sherman Act is new in this Court.

Article VI, section 2, of the Constitution of the United States (the Supremacy Clause) provides that the constitution and laws of the United States made in pursuance thereof "shall be the supreme Law of the Land." We recognize, as we must, the force of that provision. It is our view, however, that the Congress, by enacting the Sherman Act, did not intend to prohibit a valid exercise of the police power of the States,—as this Court has held the statue in question to be.

As we read *Parker v. Brown,* 317 U.S. 341 (1943), and other opinions of the Supreme Court, state action affecting commerce is generally considered to be "exempted" from the Sherman Act. Perhaps it is more accurate to say that the rule of preemption is simply not applicable to such state action. The Supreme Court, in *Parker v. Brown,* stated that,

> ". . . nothing in the language of the Sherman Act or in its history [suggests] that its purpose was to restrain a state or its officers or agents from activities directed by its legislature."

Not every act of a state or local subdivision necessarily comes within the exception to the Sherman Act. Thus, where a city engages in the business of selling electricity, gas, and water, its alleged acts to restrain trade from a competing privately owned utility are not automatically exempt. *City of Lafayette, Louisiana v. Louisiana Power & Light Co.,* ..... U.S. ....., 46 U.S. Law Week 4265 (March 29, 1978). The lines of demarcation

under *Parker v. Brown* are discussed in that Louisiana case and in the recent lawyer-advertising case of *Bates and O'Steen v. State Bar of Arizona,* ..... U.S. ....., 53 L.Ed.2d 810 (1977). In *Bates and O'Steen,* it was decided that the regulation and restriction of lawyers' advertising by the Supreme Court of Arizona was not preempted by the Sherman Act. Rather, the court held, such state action fell within the exemption announced in *Parker v. Brown.*[2] *See also, Taylor Drug Stores, Inc. v. Associated Dry Goods Corporation,* 560 F. 2d 211 (6th Cir. 1977). In the light of these opinions, it is our conclusion that Article 9001 is not preempted by the Sherman Act.

The judgment of the district court, which upheld Article 9001 against these attacks, is affirmed.

Joe R. Greenhill
Chief Justice

Opinion delivered July 12, 1978.

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2. The *Bates and O'Steen* case held, however, that the blanket suppression of legal advertising violated the free speech clause of the First Amendment.

APPENDIX B

TEXAS REVISED CIVIL STATUTES

Art. 9001. Sale of goods on both the two consecutive days of Saturday and Sunday

Prohibition of sales; items; misdemeanor

Section 1. Any person, on both the two (2) consecutive days of Saturday and Sunday, who sells or offers for sale or shall compel, force or oblige his employees to sell any clothing; clothing accessories; wearing apparel; footwear; headwear, home, business, office or outdoor furniture; kitchenware; kitchen utensils; china; home appliances; stoves; refrigerators; air conditioners; electric fans; radios; television sets; washing machines; driers; cameras; hardware; tools, excluding non-power driven hand tools; jewelry; precious or semi-precious stones; silverware; watches; clocks; luggage; motor vehicles; musical instruments; recordings; toys; excluding items customarily sold as novelities and souvenirs; mattresses; bed coverings, household linens; floor coverings; lamps; draperies; blinds; curtains; mirrors; lawn mowers or cloth piece goods shall be guilty of a misdemeanor. Each separate sale shall constitute a separate offense.

Sales for charitable and funeral or burial purposes; real property sales

Sec. 2. Nothing herein shall apply to any sale or sales for charitable purposes or to items used for funeral or burial purposes or to items sold as a part of or in conjunction with the sale of real property.

First offense; subsequent convictions; penalities

Sec. 3. For the first offense under this Act, the punishment shall be by fine of not more than One Hundred Dollars ($100.00). If it is shown upon the trial of a case involving a violation of this Act that defendant has been once before convicted of the same offense, he shall on his second conviction and on all subsequent convictions be punished by imprisonment in jail not exceeding six (6) months or by a fine of not more than Five Hundred Dollars ($500.00), or both.

Purpose; public nuisances; injunction; application and proceedings

Sec. 4. The purpose of this Act being to promote the health, recreation and welfare of the people of this state, the operation of any business whether by any individual, partnership or corporation contrary to the provisions of this Act is declared to be a public nuisance and any person may apply to any court of competent jurisdiction for and may obtain an injunction restraining such violation of this Act. Such proceedings shall be guided by the rules of other injunction proceedings.

Emergency purchases; certification

Sec. 4a. Repealed by Acts 1967, 60th Leg., p. 79, ch. 39, § 1, eff. Aug. 28, 1967.

Occasional sales

Sec. 5. Occasional sales of any item named herein by a person not engaged in the business of selling such item shall be exempt from this Act.

Legislative intent

Sec. 5a. It is the intent of the Legislature that Articles 286 and 287 of the Penal Code of Texas[1] are not to be considered as repealed by this Act; provided, however, that the provisions of said Articles shall not apply to sales of items listed in Section 1 of this Act which are forbidden to be sold on the day or days named in this Act. Acts 1961, 57th Leg., 1st C.S., p. 38, ch. 15, eff. Nov. 7, 1961.

This article was transferred from Vernon's Ann.P.C. art. 286a by authority of § 5 of Acts 1973, 63rd Leg., p. 995, ch. 399 enacting the new Texas Penal Code.

Section 4a, repealed by Acts 1967, 60th Leg., p. 79, ch. 39, § 1, required certification for emergency purchases.

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

* * *

NO. 78-574

* * *

GIBSON DISTRIBUTING COMPANY, INC., ET AL.,

Appellant

V.

DOWNTOWN DEVELOPMENT ASSOCIATION OF EL PASO, INC.,

Appellee

* * *

BRIEF OF THE STATE OF TEXAS AS *AMICUS CURIAE* IN SUPPORT OF THE MOTION OF APPELLEE TO DISMISS THE APPEAL

* * *

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November, 1978

SUBJECT INDEX

Page

THE ACTION OF THE STATE OF TEXAS IN ADOPTING AND ENFORCING ARTICLE 9001, V.T.C.S., IS NOT PROHIBITED BY THE SHERMAN ACT, SECTION 1, TITLE 15, U.S.C. 1

ARTICLE 9001, V.T.C.S., DOES NOT VIOLATE GIBSON'S RIGHT TO SUBSTANTIVE DUE PROCESS 2

INDEX OF AUTHORITIES

CASES: **Page**

Cantor v. Detroit Edison Co.
428 U.S. 579 (1976) 2

Gallagher v. Crown Kosher Super Market of Massachusetts, Inc.
366 U.S. 620 (1961) 2

Gibson Products Co., Inc. v. State
545 S.W.2d 128 (Tex.Sup. 1977) 3

Goldfarb v. Virginia State Bar
421 U.S. 773 (1975) 2

McGowan v. Maryland
366 U.S. 420 (1961) 2

Parker v. Brown
317 U.S. 341 (1943) 2

Spartan's Industries, Inc. v. Texas
397 U.S. 590 (1970) 3

State v. Spartan's Industries, Inc.
447 S.W.2d 407 (Tex.Sup. 1969) 3

State v. Sundaco, Inc.
445 S.W.2d 606 (Tex.Civ.App.--Eastland 1969, error ref'd n.r.e.) 3

Sundaco, Inc. v. Texas
397 U.S. 591 (1970) 3

Two Guys From Harrison-Allentown v. McGinley
366 U.S. 582 (1961) 2

STATUTES:

Sherman Antitrust Act, 15 U.S.C. §1 ..... 2, 4

V.T.C.S. art. 9001 ..... 2, 3

RULES:

Supreme Court of the United States, Rule 42 1

MISCELLANEOUS:

Harper, *The Texas Blue Laws* (1974) 3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

* * *

NO. 78-574

* * *

GIBSON DISTRIBUTING COMPANY, INC., ET AL.,

Appellant

V.

DOWNTOWN DEVELOPMENT ASSOCIATION OF EL PASO, INC.,

Appellee

* * *

BRIEF OF THE STATE OF TEXAS AS *AMICUS CURIAE* IN SUPPORT OF THE MOTION OF APPELLEE TO DISMISS THE APPEAL

* * *

The State of Texas, acting by and through its Attorney General and pursuant to paragraph 4 of Rule 42 of the Rules of this Court, files this its brief as *amicus curiae* in support of the motion of Downtown Development Association of El Paso, Inc., to dismiss the appeal.

Although not a party to the dispute out of which this appeal grows, nevertheless, the State of Texas has a direct interest in the continuing efforts of Gibson Distributing Company, Inc., to have the Texas statute declared unconstitutional and unenforceable.

THE ACTION OF THE STATE OF TEXAS IN ADOPTING AND ENFORCING

ARTICLE 9001, V.T.C.S., IS NOT PROHIBITED BY THE SHERMAN ACT, SECTION 1, TITLE 15, U.S.C.

Relying almost exclusively on *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), Gibson argues that because section 4 of article 9001 creates a private right of action, it runs afoul of the Sherman Act. In so arguing, Gibson completely misconceives the holding in *Cantor* which was that the imprimatur of state approval on private action did not convert the private action into state action and, thus, make it exempt from the Sherman Act under the doctrine of *Parker v. Brown*, 317 U.S. 341 (1943). In *Cantor* the State of Michigan, acting through its Public Service Commission, had approved the tariff of Detroit Edison Company which, it was claimed, violated the Sherman Antitrust Act. This Court, speaking through Mr. Justice Stevens, said that that approval was not the action of the State acting as sovereign, the "threshold inquiry" of *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

Quite to the contrary, it is clear that article 9001, V.T.C.S., *is* the act of the State of Texas acting as sovereign. That the statute authorizes private action to enforce its provisions does not bring it within the doctrine of *Cantor* or make it any less the act of the State.

ARTICLE 9001, V.T.C.S., DOES NOT VIOLATE GIBSON'S RIGHT TO SUBSTANTIVE DUE PROCESS

In three landmark decisions in 1961, *McGowan v. Maryland*, 366 U.S. 420, *Gallagher v. Crown Kosher Super Market of Massachusetts, Inc.*, 366 U.S. 620, and *Two Guys From Harrison-Allentown v. McGinley*, 366 U.S. 582, this Court surveyed the constitutionality of statutes like article 9001 and held that they passed muster.

Relying on these decisions by this Court, the Texas courts have upheld the constitutionality of article 9001, V.T.C.S., and its predecessor statutes against attacks similar to those now raised by Gibson. *State v. Sundaco, Inc.*, 445 S.W.2d 606 (Tex.Civ.App.--Eastland 1969, error ref'd n.r.e.); *State v. Spartan's Industries, Inc.*, 447 S.W.2d 407 (Tex.Sup. 1969). This Court dismissed the appeals of *Sundaco* and *Spartan's* for want of a substantial federal-question. *Sundaco, Inc. v. Texas*, 397 U.S. 591 (1970); *Spartan's Industries, Inc. v. Texas*, 397 U.S. 590 (1970).

The same questions were raised in *Gibson Products Co., Inc. v. State*, 545 S.W.2d 128 (Tex.Sup. 1977), and were there rejected by the Texas Supreme Court.

Gibson now argues that this wealth of precedent should be rejected because of the appearance on the scene of what Gibson characterizes as "a scholarly book" (Jurisdictional Statement, p. 3) or "a learned and scholarly review of the statute." (Jurisdictional Statement, p. 12). Harper, The Texas Blue Laws (1974), is anything but a learned or scholarly work. The work, by an unknown author, is obviously a slanted, incomplete recounting of what some newspapers said about what some members of the Texas Legislature said their purposes were in enacting the predecessor to article 9001. The book was brought to the attention of the Texas Supreme Court in this case. Chief Justice Greenhill in the court's opinion, said:

> The argument that the "Sunday Closing Statute" was intended to benefit certain merchants over other merchants and restrain trade is not new, either.

(Jurisdictional Statement, p. 16).

And just as the argument was rejected in the earlier cases, it was rejected by the Supreme Court in this case in 1978.

Surely the Supreme Court of Texas is better able to determine the intent of the Texas Legislature, if that is an issue, than is William G. Harper, whoever he may be, or even than this Court.

It is respectfully submitted that, just as the statute in question does not violate the Sherman Antitrust Act, so, too, it does not violate any constitutional requirement of due process or equal protection.

The appeal of Gibson should be dismissed for want of a substantial federal-question.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Brief of the State of Texas as *Amicus Curiae* in Support of the Motion of Appellee to Dismiss the Appeal has been placed, postage prepaid, in the United States First Class Mail on this the ____ day of

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